is a trespasser against the will of the owner; and the latter to be where the defendant is in possession of the land after the owner has abandoned it. Thus Collins L.J. in *Re Jolly*[3] said: "the effect of the statute of William IV was to do away with non-adverse possession, and to make all possession adverse." And in section 10(1) of the Limitation Act 1939 "adverse possession" was statutorily defined and includes a case of discontinuance under section 5(1) of that Act. Therefore, unless the owner's permission continued to operate after he had discontinued I think that the respondent in the present case was in "adverse" possession of this land from the time when the owner abandoned it, because at any time within the period of limitation the owner could have exercised his rights.

But Mr. Duff relies on the fact that the respondent's possession commenced with the owner's consent, and says that his possession continues to be permissive until something occurs to make it adverse, the onus being on the respondent to prove how and when it became adverse (*Rustomji Vol. II p. 1387, 5th Edition*). I think that his possession became adverse when the owner discontinued, and that the owner's right of action first accrued then. I accept the finding of fact that there was a discontinuance of possession by the Japanese in 1933. Very little would have been sufficient to shew a continuance of possession, but here there was nothing. The plaintiff called no evidence. Then accepting the fact of discontinuance in 1933, it seems to me that if we were to hold that the permission which was granted when the owner was in possession continued to operate after he had abandoned possession, that would be inconsistent with the fact of discontinuance, because if the respondent continued to occupy the land with the owner's permission the owner was equally in possession. And this state of affairs could continue till the end of time. "*Vigilantibus, non dormientibus, jura subveniunt.*" I cannot think that the permission granted in 1933 (as a remuneration for services then rendered) can operate to preserve the owner's rights indefinitely without any step being taken by him to assert them within the statutory period of limitation. In my opinion, when the owner discontinued possession the permission which he had given to the respondent ceased to operate, and from that moment the respondent's possession became adverse.

I would dismiss the appeal with costs.

Storr and Whitton, JJ. concurred.

Appeal dismissed.

Re SYED HASSAN BIN ABDULLAH ALJOFRI, DECD.; SYED HAMID BIN HASSAN ALJOFRI v. SHARIFAH SALMAH BINTE ABDULLAH ALHABSHI & ANOR.

[O. C. J. (Storr, J.) July 22, 1953]

[Muar — Civil Suit No. 12 of 1948]

Executors and Administrators — Executor's claim against Testator's estate — Rule in "Strong v. Bird" — Onus of proof required to establish claim.

The plaintiff who was one of the executors of the deceased's estate claimed that the deceased had made a gift to him of a piece of land during his lifetime. He also claimed that the house standing on this land and in which he has been staying was built with moneys belonging to him. His Counsel relied on the principle in **Strong** v. **Bird**[1] that "where a testator has expressed the intention of making a gift of personal estate belonging to him to one who upon his death becomes his executor, the intention continuing unchanged, the executor is entitled to hold the property for his own benefit." That principle applies also to real estate.

Held: to succeed in this case the plaintiff had to prove that there was on the part of the deceased a present intention to make an immediate gift and that such intention survived until the date of the deceased's death. While it is not a principle of law that there must be corroboration in proving the claim against the estate of a person who is dead, the claimant must prove his case against the estate clearly and convincingly. From the evidence, the plaintiff has not discharged the onus upon him to prove that there was a valid gift of land to him by the deceased.

Cases referred to:—

(1) *Strong v. Bird* L.R. 18 Eq. 315.

(2) *In re Finch* (1883) 23 Ch. 267 at pp. 276 — 277.

(3) *In re Garnett* (1886) 31 Ch. 1 at pp. 8 — 9.

(4) *In re Pink* (1912) 2 Ch. 528 at 536.

(5) *Jackson v. Rodger* (1952) 1 All E.R. 16 at 19.

TRIAL OF ISSUE.

K. E. W. Hatchard for the plaintiff.

N. A. Mallal for the defendants.

Cur. Adv. Vult.

Storr, J.: — The issue ordered to be tried by the Judge in the order dated 5th July, 1952, was as follows:—

"The abovenamed Syed Hamid bin Hassan Aljofri affirms and the abovenamed Sharifah Salmah binte Abdullah Alhabshi and Syed Abdullah bin Hassan Aljofri (Infant) by his next friend Syed Ahmad bin Abubakar Alhabshi do not admit that the land and premises described in the Schedule hereto is the property of the said Syed Hamid bin Hassan Aljofri beneficially . . . ."

THE SCHEDULE ABOVE REFERRED TO

All that piece of land (hereinafter referred to in this judgment as the land) recorded under Surat Sementara No. 56/23 Lot 1182 covering an area of 2 acres

3 roods 12 poles or thereabouts and situated in the Township of Bandar Penggaram, Batu Pahat, Johore, together with a bungalow type house (hereinafter referred to in this judgment as the house) of brick and tile roofing erected thereon and known as No. 71, Jalan Tanjong Laboh.

Mr. Hatchard appeared for the plaintiff in this issue and Mr. Mallal for the defendants.

The following facts were admitted :—

(1) The plaintiff is the eldest son of Syed Hassan bin Abdullah Aljofri (hereinafter referred to as the deceased); (2) The deceased at the date of his death on 15th November, 1943 was the registered holder of the land; (3) In 1927 the deceased built the house on the land and the house was completed in 1929; (4) In 1929 the plaintiff and his family went into occupation of the house which has remained in his possession up to the death of the deceased and to the present day; (5) The deceased by his last Will and testament appointed the plaintiff as one of the four Executors and Trustees; (6) The plaintiff was one of the Executors who proved the Will of the deceased.

The plaintiff claims (1) that the house was built with moneys belonging to him which he had deposited from time to time with the deceased; (2) that the deceased at the same time gave him the land on which the house was built for his exclusive use and that thereafter the deceased held the land as a trustee for him; (3) that clause 2 of the Will of the deceased explicitly excepted the land, but, owing to an error, referred to house No. 70, Jalan Tanjong Laboh, as being on it instead of No. 71 (the house) because of the gift by the deceased of the land to him.

The plaintiff has now applied to the present trustees of the estate of the deceased to transfer the land to him as the beneficial owner. He is claiming the land from the deceased's estate as a gift from the deceased in his lifetime. In support of his claim he gave evidence himself and produced two accounts (1) in the deceased's handwriting (P1) and (P2) a copy of the deceased's ledger (P2), and called a brother of the deceased (Syed Idroos bin Abdullah Aljofri) and Mohamed Marican, a land broker of Batu Pahat, to corroborate his evidence as to the gift of the land from the deceased in 1927 (presumably about July, 1927).

Mr. Hatchard, in his very able argument, relied on the principle laid down in *Strong v. Bird*[1] which is given in *Williams on Executors,* 13th edition, p. 780, paragraph 1125, that "where a testator has expressed the intention of making a gift of personal estate belonging to him to one who upon his death becomes his executor, the intention continuing unchanged, the executor is entitled to hold the property for his own benefit". That principle applies not only to personal estate but also to real estate.

Mr. Mallal, for the defendants, called no evidence and submitted (1) that the evidence of the plaintiff and his witnesses was not sufficient to substantiate the claim that the house was built with the moneys of the plaintiff held by the deceased, (2) that there was not sufficient reliable evidence that the deceased had ever given the land, or ever intended giving the land, to the plaintiff, (3) that the land and house formed part of the estate of the deceased, (4) as to the mention of Surat Sementara 56/23 in clause 2 of the Will, that that was obviously an error by the deceased, but if one looked at the first Will of the testator, which of course was revoked by the second Will, it was obvious that the testator had made a mistake as to the land on which the family house, No. 70 Jalan Tanjong Laboh, stood, and that the reason for excepting house No. 70 was that that house should be kept as a family house and that therefore no revenue should be collected from it. I can say at this stage that I consider that submission to be the correct answer to the mistake in reference to Surat Sementara 56/23 in the Will.

As to the principles that should be applied to the present case, he referred to *In re Finch*[2] where Lindley, L.J. said :—

"This is a claim made by a living person against the estate of a person who is dead. It is the rule — and it is a sensible rule — to require before giving weight to the testimony of that living claimant that such testimony should be corroborated in some way or other. If this case had been tried before a jury, and the jury had found in favour of the claimant, I am not prepared to say that there would have been any principle of law to enable us to set aside the verdict; but where we have not had the advantage of having twelve men in the box, the ordinary practice of the Court is to be very reluctant to give effect to the uncorroborated statement of anybody, as against the estate of a deceased person. It has been said in this case that the learned Judge in the Court below appeared to have taken the view that there was corroborative evidence; and therefore it becomes important to look into that. As regards the plate, and as regards the bust, the corroborative evidence relied upon appears to be substantially the same, that is to say, that they were both sent to the house of the lady in Paris, which house was settled to her separate use. Now, before that can be regarded as corroborative evidence, we must look at it in order to see what it corroborates. It is undoubtedly consistent with the lady's story; that is plain enough. But it seems to me to be equally consistent with another view altogether; and evidence which is consistent with two views does not seem to me to be corroborative of either . . ."

and submitted that the evidence called in support of the plaintiff's claim did not in the true sense of the word corroborate his story. Both his witness, Syed Idroos and Mohamed Marican, were vague as to dates and their evidence could not be relied upon.

He also referred to *In re Garnett*[3] where Brett, M.R., said :—

"It was said that this release cannot be questioned because the person to whom it was given is dead, and also that it cannot be questioned unless those who object and state certain facts are corroborated, and it is said that that was a doctrine of the Court of Chancery. I do not assent to this argument; there is no such law. Are we to be told that a person whom everybody on earth would believe, who is produced as a witness before the Judge, who gives his evidence in such a way that anybody would be perfectly senseless who did not believe him, whose evidence the Judge, in fact, believes to be absolutely true, is, according to a doctrine of the Courts of Equity, not to be believed by the Judge because he is

not corroborated? The position seems unreasonable the moment it is stated. There is no such law. The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be properly sifted, and the mind of any Judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd. And what is ridiculous and absurd never is, to my mind, to be adopted either in Law or in Equity."

He further submitted that if the Court sifted the evidence carefully it would come to the conclusion that in fact there was no gift of the land to the plaintiff and that the deceased built the house with his own money and not with the money of the plaintiff, and that therefore the plaintiff had failed to prove his claim.

I agree with Mr. Hatchard that if the plaintiff can show that the deceased gave to him, or intended to give to him, the land during his lifetime and that intention remained with him to his death, then he is entitled to succeed in his claim to have the land and the house which is built on it transferred to him by the present trustees of the deceased's estate. But as to the proof necessary in a case of this kind, Farwell, L.J., said *In re Pink*[4] :—

"Since **Strong** v. **Bird**[1] we must regard the matter in the light given us by that decision. It is plain that a mere intention to give, not carried out during the lifetime, will not do, because that would in effect be to allow a man to dispose after his death of his property by a document not testamentary. It is plain also that a mere intention to give is not enough, because you want an immediate gift. If there is an immediate gift, then the resulting trust for the benefit of the beneficiaries is rebutted."

And in *Jackson v. Rodger*[5] Sir Raymond Evershed, M.R., said in relation to a claim by an Executrix, for a motor car, the property of the testatrix, which she alleged was a gift to her :—

"It is a trite observation, but nevertheless one which must not be forgotten, that a claimant in such a situation has a heavy onus to discharge. He or she must prove the case against his or her testator's estate clearly and convincingly"

and in the same case, Jenkins, L.J., stated :—

"To succeed in this case the plaintiff had to prove that there was on the part of the testatrix a present intention to make an immediate gift to her of the motor car, and that such intention survived until the date of the death of the testatrix."

After considering the authorities and the evidence before me, I have come to the conclusion that the plaintiff has not discharged the onus upon him to prove that there was a valid gift of the land to him by the deceased. The fact that nothing was found in the accounts of the deceased, who was admittedly a very careful man with his accounts, that the money used for the house came from money deposited with him by the plaintiff, and that in 1934 the deceased transferred to him properties bought with the plaintiff's money but omitted to transfer the land and the house, confirm my opinion. With regard to the witnesses Syed Idroos and Mohamed Marican, I consider that their evidence was extremely vague and I am unable to accept it as being sufficient or any corroboration of the plaintiff's claim.

The plaintiff's evidence appeared to me to be unreliable and he was apparently quite ready to make any statement that he thought would further his claim. I refer particularly to his evidence which he afterwards contradicted that the land was bought with his money. I would however say that I think he genuinely has an idea that the land and house should belong to him as he has remained in the house for so long without being charged with rent. That, however, does not in any way further his claim on an issue of this nature where an executor is claiming against his testator's estate; in fact he is in no better position than his younger brother, Syed Mohamed, who has also lived in one house belonging to the deceased, rent free, since he was born.

The plaintiff's claim on the issue will be dismissed.

Claim dismissed.

DESAI & CO. v. CHOP SENG TECK.

[O. C. J. (Knight, J.) August 26, 1952]
[Singapore — Suit No. 926 of 1951]

Sale of Goods — Sale not by sample, warranty or adequate description — Contract — Goods not up to quality — Fair average quality — Refusal to accept goods — Damages — Caveat emptor.

By a contract in writing the defendants agreed to purchase from the plaintiffs 20 tons of "White Melon Seeds — Fair Average Quality". The seeds were to be shipped from Port Sudan and delivery was to be effected at the defendants' store in Singapore. Delivery of the goods at the defendants' store was duly tendered but the defendants refused to accept the goods on the ground that they were of inferior quality. The sale was not by sample and without warranty.

Held: although the seeds in question were slightly inferior to what the trade knew as "White Melon Seeds — Fair Average Quality" their degree of inferiority was not sufficient to entitle the defendants to reject them on the grounds that something other than they had contracted to buy had in fact been supplied. They were in fact "White Melon Seeds — Fair Average Quality" and were reasonably described as such.

Case referred to :—

(1) *Wieler v. Schilizzi* (1856), 17 C.B. 619; 139 E.R. 1219.

ACTION FOR DAMAGES.

Matthews Abraham for the plaintiffs.

Chong Thutt Pitt for the defendants.

Cur. Adv. Vult.

Knight, J. : — In this action the plaintiff firm which deals in agricultural produce, seeks damages in